

BANISHING THE SPECTER OF JUDICIAL FOREIGN  
POLICYMAKING: A COMPETENCE-BASED  
APPROACH TO THE POLITICAL  
QUESTION DOCTRINE

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I. INTRODUCTION

In the years since the September 11th attacks, the Bush Administration has argued for an expansive understanding of the executive branch's authority to conduct foreign policy, one free from judicial scrutiny or review.<sup>1</sup> The Administration has not limited its desire for a long leash in the conduct of foreign affairs to the war on terrorism or the detention of suspected "enemy combatants." One manifestation of the executive branch's unilateralism has been Justice Department briefs filed in human rights cases under the Alien Tort Claims Act (ATCA),<sup>2</sup> a 215-year-old statute allowing foreign victims of human rights violations to sue the perpetrators in U.S. courts.<sup>3</sup>

In several recent ATCA cases, the Solicitor General's Office<sup>4</sup> filed briefs arguing that interpreting the ATCA as providing a cause of action to foreign plaintiffs interferes with the executive's responsibility to conduct foreign affairs, thereby violating separation of powers principles.<sup>5</sup> The Supreme Court

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1. See, e.g., Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, 31-39 (Aug. 1, 2002).

2. 28 U.S.C. § 1350 (2000).

3. The Alien Tort Claims Act, enacted as part of the first Judiciary Act in 1789, states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations." *Id.*

4. The Office of the Solicitor General is the Department of Justice arm that conducts and supervises government litigation in the Supreme Court.

5. See, e.g., Brief for the United States as Respondent Supporting Petitioner at 31, *Sosa v. Alvarez-Machain* 542 U.S. 692 (No. 03-339); Brief for the United States of America as Amicus Curiae at 4, *Doe v. Unocal Corp.*, Nos. 00-56603, 00-56628 (9th Cir. 2003) ("the assumption of this role by the

heard the most notable of these, *Sosa v. Alvarez-Machain*, on June 29, 2004.<sup>6</sup> The Administration has made similar arguments in well-publicized actions contesting the legality of the detainment of suspected terrorists at Guantanamo Bay, Cuba.<sup>7</sup> In both of these contexts, the Administration's concern is the same: the specter of judicial foreign policymaking. A recent *New York Times* article characterizes this apprehension accordingly: "[T]he last thing [the State Department] desires is the transformation of the American legal system into a blunt instrument of foreign policy."<sup>8</sup>

Arguments advocating a limited role for the judiciary in foreign relations cases date back to Chief Justice Marshall's 1803 opinion in *Marbury v. Madison*, in which Marshall drew a distinction between executive acts that are reviewable, and those that are not:

By the constitution of the United States, the President is invested with certain important political pow-

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courts under the ATS . . . raises significant potential for serious interference with the important policy interests of the United States, and is contrary to our constitutional framework and democratic principles"); *see also* Supplemental Statement of Interest of the United States of America at 16-17, *Doe v. ExxonMobil Corp.*, No. 01-1357 (D.D.C. July 14, 2003), *available at* <http://www.laborrights.org>.

6. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The plaintiff in the case was a Mexican doctor who, after being abducted and transported to the United States to face trial, was acquitted of the murder of a federal drug enforcement officer. *Id.* at 697. He subsequently sued the United States; the Mexican civilians who assisted in his abduction, including a former Mexican policeman named Sosa; and the Drug Enforcement Agency under ATCA for kidnapping, torture, arbitrary detention, and a range of other tort claims. *Id.* at 697-98. The district court entered summary judgment for Alvarez-Machain on the claims against Sosa for kidnapping and arbitrary detention, holding that they violated customary international law. On appeal, a panel of the Ninth Circuit upheld liability under ATCA. The Ninth Circuit decided to rehear the case en banc and upheld the panel's finding that Sosa could be held liable for arbitrary arrest and detention under ATCA. *Id.* at 699. The Supreme Court granted certiorari and heard the case on March 30, 2004. *Id.* at 692.

7. *See, e.g., Rasul v. Bush*, 542 U.S. 466 (2004) and *Al Odah v. United States*, 124 S. Ct. 2686 (2004).

8. Jennifer Senior, *A Nation Unto Himself*, N.Y. TIMES MAGAZINE, Mar. 14, 2004, at 39. The article profiles an attorney, Ronald Motley, who has brought a civil suit on behalf of several families of September 11th victims against Saudi charities, financial institutions, and members of the Saudi royal family for financing the attacks. *Id.*

ers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience . . . where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president . . . nothing can be more perfectly clear, than that their acts are only politically examinable.<sup>9</sup>

This language gave birth to the “political question” doctrine, a jurisprudential device requiring courts to abstain from adjudication where a case raises purely “political” questions more appropriately handled by another branch of government. Marshall identified foreign affairs as an area where executive decisions might sometimes be unreviewable.<sup>10</sup> While he did not clearly articulate a reason for separating out “political” activities, scholars believe the purpose of the political question doctrine is to reduce inter-branch friction produced by judicial review.<sup>11</sup> If unrestrained, judicial review would allow the judiciary to pass judgment on the actions of the executive branch, thereby threatening separation of powers principles underlying the Constitution. The political question doctrine is one method of protecting separation of powers. However, as this Note will argue, the doctrine is at risk of losing its potency.

In *Alvarez-Machain*, the government hoped to strip the ATCA of its usefulness by arguing that the statute does not provide a cause of action to foreign plaintiffs without further congressional action.<sup>12</sup> As a result, the government’s briefs supporting certiorari did not reference the political question doctrine explicitly; it did not want to leave federal courts with discretion as to whether to adjudicate ATCA cases.<sup>13</sup> Never-

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

10. *Id.* at 166.

11. *See, e.g.*, GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL LAW* 85 (4th ed. 2001).

12. *Alvarez-Machain*, 542 U.S. at 712.

13. The brief mentions the doctrine only once, in its discussion of Judge Gould’s dissent on political question grounds in the Ninth Circuit opinion. Brief for the United States as Respondent Supporting Petitioner, *supra* note 5, at 43. Here, the doctrine is characterized as an extreme discretionary measure rarely invoked by the judiciary—perhaps to counter arguments that the availability of the doctrine will mitigate separation of powers concerns.

theless, the *Alvarez-Machain* brief is a valuable example of executive branch unilateralism because it emphasized the separation of powers concerns associated with the adjudication of ATCA cases.<sup>14</sup> The brief identified the Constitution's "textual commitment of the responsibility for international affairs to the political branches,"<sup>15</sup> noting that "foreign policy is 'of a kind for which the Judiciary has neither aptitude, facilities nor responsibility.'"<sup>16</sup> The brief also suggested that the Ninth Circuit's decision upholding jurisdiction in *Alvarez-Machain* improperly gave courts the power to override policy judgments of the political branches.<sup>17</sup> These kinds of arguments may become more frequent, and they have the potential to result in judicial abstention on political question grounds in cases that do not necessarily justify it.

The Supreme Court granted certiorari<sup>18</sup> and, on June 29, 2004, held that the ATCA is a "jurisdictional grant . . . enacted on the understanding that the common law would provide a

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However, as discussed above, this is somewhat of a mischaracterization of the use of the doctrine at least in the foreign relations context, where the doctrine is widely used by lower courts. See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1442 (1999).

14. In fact, it was the amicus briefs for the Respondents that argued that ATCA does not threaten executive foreign policymaking because the political question doctrine is available as a discretionary tool for the judiciary. See, e.g., Brief for the World Jewish Congress and the American Jewish Committee as *Amici Curiae* in Support of Respondents at 23-26, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339); Brief of *Amici Curiae* Alien Friends Representing Hungarian Jews and Bougainvilleans Interests in Support of Respondent at 23, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339); Brief of *Amici Curiae* Career Foreign Service Diplomats in Support of Respondent at 17, *Sosa v. Alvarez Machain* 542 U.S. 692 (2004) (No. 03-339).

15. Brief for the United States as Respondent Supporting Petitioner, *supra* note 5, at 31, 38.

16. *Id.*

17. *Id.* at 38 ("The Ninth Circuit's decision accordingly transgresses fundamental and textually committed separation-of-powers principles."). The Ninth Circuit majority, in responding to a dissent from Judge Gould on political question grounds, noted: "We see a critical distinction between, on the one hand, second guessing the foreign policy judgments of the political branches to whom such judgments have been constitutionally assigned, and on the other hand, reviewing claims based in tort and brought under federal statutes instructing the judiciary to adjudicate such claims." *Alvarez-Machain v. United States*, 331 F.3d 604, 614 n.7 (9th Cir. 2003).

18. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

cause of action for [a] modest number of international law violations with a potential for personal liability.”<sup>19</sup> The Court ruled that district courts can exercise discretion in determining whether an ATCA claim is based upon an international norm of sufficient specificity<sup>20</sup> to entitle the plaintiff to recover. However, the plaintiff’s claim of arbitrary detention—a “relatively brief detention in excess of positive authority”—did not meet this standard.<sup>21</sup>

The Supreme Court’s decision in *Alvarez-Machain* did not close the door on arguments either 1) that the judiciary’s interference in foreign relations cases threatens separation of powers principles by impinging on the authority of the executive, or 2) that the political question doctrine is an important weapon in preventing such encroachment. In fact, the Court identified “the potential implications for the foreign relations of the United States of recognizing private causes of action for violating international law” as one reason for district courts to exercise caution in applying ATCA, and to be “wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”<sup>22</sup> In an important footnote, the Court discussed the fact that “a policy of case-specific deference to the political branches” should limit the types of ATCA claims that can be heard in federal court, because “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”<sup>23</sup> Separation of powers concerns have also been raised in other pending ATCA cases,<sup>24</sup> and a num-

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19. *Id.* at 724.

20. The Court held that international norms justifying recovery under ATCA must be both “accepted by the civilized world” and “defined with a specificity comparable to . . . the 18th-century paradigms” that the statute targeted, including offenses against ambassadors, piracy, and individual actions arising from prize captures. *Alvarez-Machain*, 542 U.S. at 725 (2004).

21. *Id.* at 737.

22. *Id.* at 727.

23. *Id.* at 733 n.21; Beth Stephens, Address at the 9th Annual Herbert Rubin and Judge Rose Luttan Rubin International Law Symposium, New York University School of Law (Feb. 25, 2005).

24. The Justice Department’s brief in *Doe v. Unocal*, No. 00-56603, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh’g granted*, 2003 WL 359787 (9th Cir. Feb. 14, 2003), cites to Judge Robb’s concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Robb, J., concurring), arguing for dismissal on political question grounds. Brief for the United States of

ber of recent ATCA cases have been dismissed specifically on political question grounds.<sup>25</sup> All of this suggests that in the foreign relations context generally—and in ATCA cases specifically—the executive branch is likely to continue to emphasize its autonomy to conduct foreign affairs post-*Alvarez-Machain*.

In addition, changes in international relations and to the conduct of foreign policy as a general matter will only increase use of the political question doctrine as a defense. Many scholars believe that states are losing their monopoly on the conduct of international relations.<sup>26</sup> While states remain powerful actors,<sup>27</sup> it is undoubtedly true that other political units are now significant foreign policymakers: individuals, nongovernmental organizations, and corporations.<sup>28</sup> As globalization has changed the way these actors relate to one another, foreign policy, too, has changed in ways that would have been impossible or highly implausible just a few decades earlier.<sup>29</sup>

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America as Amicus Curiae, *Doe v. Unocal* (No. 00-56603) at 7. In another case, *Doe v. ExxonMobil*, the State Department provided a letter at the court's request prior to trial which indicated that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States." Letter from William H. Taft IV, Legal Adviser, Dep't of State, to Judge Louis Oberdorfer (July 29, 2002), available at <http://www.laborrights.org>.

25. See, e.g., *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1198-99 (C.D. Cal. 2002); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 488 (D.N.J. 1999).

26. See, e.g., Stanley Hoffmann, *Clash of Globalizations*, 81 FOREIGN AFF. 104 (2002); Richard Falk, *State of Siege: Will Globalization Win Out?*, 73 INT'L AFF. 123, 126 (1997).

27. See, e.g., Martin Wolf, *Will the Nation-State Survive Globalization?*, 80 FOREIGN AFF. 178 (2001).

28. See generally Falk, *supra* note 26; Deanne Julius, *Globalization and Stakeholder Conflicts: A Corporate Perspective*, 73 INT'L AFF. 453 (1997); SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996).

29. For example, anti-globalization groups from around the world have been able to join together in protest both in person, at World Bank and World Trade Organization summits and online, and in cyberspace. Multinational corporations such as Coca-Cola and McDonalds have become, for better or worse, icons of "world culture" as they have spread to even the least populated places on earth. Alarming, groups of Islamic fundamentalists lacking in strong national ties, but full of anti-Western rhetoric—often inspired by radicals such as Osama Bin Laden—have been able to commit one of the greatest atrocities in this country's memory. These are just three examples of new types of "foreign conduct" that have arisen over the past several decades. See generally BENJAMIN R. BARBER, *JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD* (1995).

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Global change is also manifested in U.S. caselaw. Both American citizens<sup>30</sup> and foreign nationals<sup>31</sup> have sued for international wrongs under ATCA and common law torts. The types of defendants called to account for their actions in such suits are even more varied: foreign entities of uncertain governmental status, such as the P.L.O.<sup>32</sup> and the Nicaraguan contras;<sup>33</sup> foreign individuals, including former statesman and government officials;<sup>34</sup> foreign companies;<sup>35</sup> and most recently, American corporations doing business abroad, often but not always in a labor-intensive industry such as mineral or oil extraction.<sup>36</sup> The range of issues raised in ATCA cases runs the gamut from the execution of American citizens working abroad in South America;<sup>37</sup> to terrorism-related incidents in the Middle East and elsewhere;<sup>38</sup> to forced labor claims arising from a war waged more than fifty years ago;<sup>39</sup> to claims of genocide by the victims of ethnic cleansing;<sup>40</sup> to most recently, claims that American corporations have been complicit in human rights violations committed by military regimes in the third world.<sup>41</sup> Bradley and Goldsmith ask in their recently published casebook on foreign relations law: "Is it possible to

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30. *E.g.*, *Klinghoffer v. S.N.C.*, 937 F.2d 44 (2d Cir. 1991); *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992).

31. *E.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

32. *E.g.*, *Klinghoffer*, 937 F.2d at 44; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

33. *E.g.*, *Linder*, 963 F.2d at 332.

34. *E.g.*, *Kadic*, 70 F.3d at 232.

35. *See, e.g.*, *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (defendant was Degussa AG, a German corporation); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (defendants were part of an international mining group headquartered in London).

36. *See, e.g.*, *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002).

37. *E.g.*, *Linder*, 963 F.2d at 332.

38. *E.g.*, *Klinghoffer v. S.N.C.*, 937 F.2d 44 (2d Cir. 1991); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

39. *See, e.g.*, *Burger-Fischer*, 65 F. Supp. 2d at 248; *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370 (D.N.J. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

40. *E.g.*, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

41. *See, e.g.*, *Unocal*, 395 F.3d at 937-42.

draw a bright line today between foreign and domestic issues?"<sup>42</sup> Arguably, the answer is no.

The explosion in types of cases that may be legitimately considered foreign conduct will only exacerbate the problems associated with applying the political question doctrine. Courts may be tempted to use a categorical approach, applying the doctrine to any case that touches foreign conduct, no matter the factual context. If that occurs, the separation of powers would be damaged; the judiciary dismissing cases that should properly be heard is an expansion of the power of the executive branch at the expense of the judiciary. The problem Marshall anticipated in *Marbury*—the danger of judicial overreaching—will be replaced by its opposite, excessive judicial deference.

This Note argues that a categorical approach to the political question doctrine would be a mistake. While many cases address international subject matter, they do so in different ways that are relevant to the capacity of the judiciary to adjudicate. Not all cases involving foreign relations threaten the foreign policymaking responsibilities and prerogatives of the executive branch. A categorical approach to the political question doctrine would likely lead to over-application. Cases that do not present particularly novel legal issues, or that do not raise separation of powers concerns—ones which are otherwise easily justiciable—would be dismissed simply because they touch foreign relations in some way.<sup>43</sup> Jacques Delisle describes the problem thus:

U.S. lawsuits concerning human rights abuses abroad are, or can be expected to become, on average, a good deal less 'foreign' and less disconnected from the ordinary substance and process of 'domestic' litigation . . . . Keeping out ATCA or other 'foreign' human rights cases is significantly and increasingly likely to be possible only at considerable cost in the

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42. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 59 (2003).

43. See, e.g., David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1470 (1999) (identifying the "growing phenomenon of resurrecting an absolutist political question bar in the adjudication of treaty rights").

performance of more ordinary and more widely valued judicial functions.<sup>44</sup>

As such cases become more common and less “foreign,” the Administration’s position that the judiciary should not review executive action relating to foreign affairs weakens. Preventing the judiciary from hearing any foreign relations cases poses just as grave a threat to the institution of judicial review as allowing all cases to be reviewed by the courts.<sup>45</sup> As Harold Koh articulated in a recent *New York Times* article: “Telling U.S. courts not to evaluate international tort claims is like King Canute telling the tide not to come in. I’m sorry, but the sun is coming up tomorrow, and it’s called globalization.”<sup>46</sup>

Consequently, it is high time to re-examine the use of the political question doctrine, and to suggest a way in which the doctrine should be reformulated. Specifically, the political question doctrine should be able to more carefully distinguish between those cases that raise separation of powers concerns and should therefore be dismissed, and those which do not. In the remainder of this Note, I propose changes to the doctrine that would enable it to do so. In Part II, I will outline the evolution of the political question doctrine and its application to ATCA cases since the early 1980s. I argue that the doctrine has often been applied wherever there is “foreign conduct” of any kind: the categorical approach to the doctrine. In other, less frequent cases, courts have engaged in a more discerning evaluation of judicial competency to adjudicate the issues

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44. Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A “Sinical” Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 550 (2002). Jack Goldsmith has likewise argued that “[i]ncreasing global interdependence and the dissolution of the distinction between private and public international law mean that almost any issue with a foreign element can now be viewed to ‘affect’ foreign affairs.” Goldsmith, *supra* note 13, at 1413.

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45. Franck takes this argument to the extreme, claiming that the political question doctrine itself is incompatible with American constitutional theory and its system of divided and limited power. I do not believe the doctrine is wholly inappropriate, but merely that it is becoming unwieldy and too difficult to apply, and as a result no longer serves its goals. THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 4-5 (1992); *see also* Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT’L L. 814 (1989).

46. Senior, *supra* note 8, at 39.

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raised, in order to decide whether the political question doctrine applies or not. I will call this the “competency” or “competence-based” approach.

In Part III, I argue that the proper approach to the political question doctrine requires, first and foremost, an analysis of the court’s competency to adjudicate the relevant issues. The categorical approach to the doctrine is over-inclusive and results in the dismissal of many cases that do not raise separation of powers concerns. A focus on competency—which will create the proper balance between adjudications and dismissals—can be achieved by reformulating the current test, articulated in *Baker v. Carr*,<sup>47</sup> for determining whether a nonjusticiable political question exists. By arguing that the judiciary is “competent,” I mean to suggest that it possesses certain analytical skills—interpretive and fact-finding, among others—that enable it to hear more cases than the doctrine currently allows. By contrast, the judiciary lacks other skills, among them behavior-assessment and political intuition, which are instead the province of the executive branch. If a case demands reliance on these, it should probably be dismissed under the political question doctrine. Focusing on judicial competency, I argue, might enable courts to successfully overcome criticisms of the political question doctrine as lacking in a “workable definition” and “in disarray.”<sup>48</sup> Finally, in Part IV, I conclude by discussing the political question doctrine post-*Alvarez-Machain*, and the urgency of a reworking of the doctrine along competency lines.<sup>49</sup>

47. *Baker v. Carr*, 369 U.S. 186 (1962).

48. CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 85 (6th ed. 2002), cited in BRADLEY & GOLDSMITH, *supra* note 42, at 58.

49. There exists an important controversy in academic scholarship regarding the political question doctrine. Some scholars have argued that, in many cases where courts claim to be applying the political question doctrine, they are not *abstaining* from deciding the case, but rather, *deferring* to the executive branch’s position. See, e.g., Louis Henkin, *Is There A ‘Political Question’ Doctrine?*, 85 *YALE L.J.* 597 (1976). Louis Henkin has argued that cases manifesting judicial deference should not properly be understood as political question cases. *Id.* While this debate is important, it does not affect the argument that the decision whether to apply the political question doctrine should be made on the basis of an assessment of judicial competency. Abstention and deference are both justified by separation of powers concerns. The question of which choice—abstention or deference—is the preferred course of action is a topic best reserved for another paper. This Note as-

II. THE HISTORY OF THE POLITICAL QUESTION DOCTRINE AND ITS APPLICATION TO ATCA CASES

In his articulation of the political question doctrine in *Marbury*, Justice Marshall left several important issues unaddressed. He did not elaborate on the intended scope of judicial review, or indicate which issues should be considered “foreign” and requiring judicial deference. As a result, courts applied the political question doctrine broadly in its early years, particularly to cases involving foreign affairs.<sup>50</sup> The executive branch’s power to conduct foreign relations was often regarded as judicially unreviewable. In the doctrine’s early years, when the executive branch claimed to exercise its “foreign affairs” powers, courts dismissed those cases on political question grounds without further inquiry.<sup>51</sup> They did not evaluate the precise question presented—whether constitutional, statutory, or otherwise—nor did they assess whether foreign affairs cases, as a class, presented issues that the judiciary could not capably resolve.

*United States v. Curtiss-Wright Export Corp.* provides an example of the traditional approach towards foreign relations cases.<sup>52</sup> In dicta, Justice Sutherland argued that the President should be allowed the exclusive authority among the branches to conduct foreign relations. However, the question in the case was whether Congress’s delegation of power to the president to prohibit arms sales to nations involved in the Chaco war was unconstitutional. This relatively straightforward matter of constitutional interpretation was a task with which the

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sumes that both abstention and deference fall under the political question doctrine and that both are vulnerable to the criticism that they have been used in cases not raising legitimate separation of powers concerns.

50. See, e.g., *Jones v. United States*, 137 U.S. 202, 212 (1890) (question of sovereignty over Caribbean island a political question); *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1853) (ratification of power of foreign government a political question); *Williams v. Suffolk Ins. Co.*, 38 U.S. (16 How.) 415, 420 (1839) (sovereignty of foreign nation a political question); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 308-13 (1829) (territorial boundary determination a political question); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 633-34 (1818) (recognition of new government a political question). See generally BRADLEY & GOLDSMITH, *supra* note 42, at 57 (discussing the Supreme Court’s categorical approach to the political question doctrine in foreign affairs cases).

51. See, e.g., FRANCK, *supra* note 45, at 4.

52. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

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judiciary was intimately familiar and, indeed, constitutionally assigned under Article III. Although the question before the court did not justify such an expansive reading of executive power, much less the articulation that foreign relations cases are not appropriate subject matter for judicial handling, the case has been widely cited for that proposition.<sup>53</sup> *Curtiss-Wright* reveals the categorical understanding of foreign affairs in the political question doctrine's early days.<sup>54</sup> Thomas Franck describes the decision in *Curtiss-Wright* as "seemingly bent on abdicating judicial responsibility to 'say what the law is' in the entire foreign-relations field."<sup>55</sup> Judicial competence was not a part of the vocabulary of foreign relations cases at this time—such cases were the province of the executive.

In 1962, the Supreme Court radically changed its approach to the political question doctrine in *Baker v. Carr*<sup>56</sup> when it found that the apportionment of a state legislature presented a justiciable question. In its analysis, the Court held that one or more of the following six elements justifies a dismissal on political question grounds:

- (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- (2) a lack of judicially discoverable and manageable standards for resolving it;
- (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
- (5) an unusual need for unquestioning adherence to a political decision already made; or

53. See, e.g., *Haig v. Agee*, 453 U.S. 280, 294 (1981); *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n v. Maritime Admin.*, 215 F.3d 37, 44 (D.C. Cir. 2000); *Atlee v. Laird*, 347 F. Supp. 689, 698 (E.D. Pa. 1972).

54. See BRADLEY & GOLDSMITH, *supra* note 42, at 57; see also Goldsmith, *supra* note 13, at 1400-01.

55. FRANCK, *supra* note 45, at 16.

56. See *Baker v. Carr*, 369 U.S. 186 (1962).

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(6) the potential for embarrassment from multifarious pronouncements by various departments on one question.<sup>57</sup>

The Court also made several significant pronouncements in *Baker* regarding the proper application of the political question doctrine in the area of foreign relations. The Court noted that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance” and that the justiciability of foreign relations depends upon “a discriminating analysis of the particular question posed.”<sup>58</sup> The Court also said that the judiciary may construe a treaty, statute, or executive proclamation rather than abstain from adjudication where there has been no conclusive executive branch action in a particular area of foreign policy—for example, where a treaty has not clearly been terminated, or where belligerency overseas has not been clearly recognized.<sup>59</sup> *Baker’s* language, on its face, represented a move away from a categorical appraisal of whether there was foreign conduct at issue at all in a particular case, and toward an assessment of the particular question raised and whether the executive had taken a clear policy stance justifying application of the doctrine. Barring the existence of such a policy statement, the judiciary could engage in the interpretive activities within its constitutionally established province.

However, in practice, *Baker* did not narrow the application of the political question doctrine in the foreign relations context as significantly as it did in the domestic context. In the domestic context, there are usually constitutional constraints on the political branch behavior at issue that make a case justiciable;<sup>60</sup> in such instances, the court is constitutionally re-

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57. *Id.* at 217.

58. *Id.* at 211.

59. *Id.* at 212-13.

60. *But see* *Nixon v. U.S.*, 506 U.S. 224 (1993) (holding that the Constitution’s grant of authority to the Senate of “the sole Power to try all Impeachments” rendered a district court judge’s claim nonjusticiable on political question grounds). The Court found that “use of the word ‘try’ [lacks] sufficient precision to afford any judicially manageable standards of review of the Senate’s actions” and that Article I, Section 3 was a textual commitment of impeachment matters to the Senate alone, not the judiciary. 506 U.S. at 230-31.

quired to “say what the law is.”<sup>61</sup> However, several unique factors exist in the foreign relations context which make a narrow application of the doctrine unlikely. First, the executive branch is traditionally understood to have broad, unreviewable powers to conduct foreign relations.<sup>62</sup> Second, legal standards—particularly if derived from international law—are considered difficult to discern in the foreign relations context.<sup>63</sup> Finally, the risk of harm to the international reputation of the United States is thought to come into play in foreign relations cases, implicating the final three *Baker* factors.<sup>64</sup> As one scholar has aptly put it: “[A]ll the doctrines that lead courts not to decide cases find a home in the field of foreign affairs.”<sup>65</sup>

Post-*Baker*, more courts undertook a more particularized evaluation of the question at issue in a given case, rather than apply the doctrine simply because the case dealt with foreign conduct. However, some courts still struggled to identify one or more of the *Baker* factors in foreign relations cases, erring on the side of over-application, and dismissing cases that did not truly implicate separation of powers concerns. This continues to be true today. Even where courts do not dismiss foreign relations cases on political question grounds, they often exhibit a great deal of deference to executive branch conduct. The result is an inconsistent application of the doctrine post-*Baker*.

For example, the Supreme Court did not follow *Baker*'s case-by-case approach in *Goldwater v. Carter*,<sup>66</sup> and the justices split over the justiciability of the President's termination of a treaty without congressional authorization. Four justices ar-

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61. Some scholars have argued that use of the doctrine is falling out of favor at the Supreme Court level and in many areas in which it has traditionally been applied—with the notable exception of foreign affairs. See, e.g., Bederman, *supra* note 43, at 1441; Goldsmith, *supra* note 13, at 1403.

62. See, e.g., *United States v. Curtiss-Wright Export Corp.* 299 U.S. 304, 319 (1936).

63. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725-26 (2004).

64. See, e.g., *Made in the USA Found. v. United States*, 242 F.3d 1300, 1317-18 (11th Cir. 2001) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

65. Andreas Lowenfeld, Book Review, 87 HARV. L. REV. 494, 506 (1973), cited in Norman Dorsen, *Foreign Affairs & Civil Liberties*, 83 AM. J. INT'L. L. 840 (1989).

66. *Goldwater v. Carter*, 444 U.S. 996, 1000 (1979); see also FRANCK, *supra* note 45, at 37.

gued that abstention was constitutionally required because the case raised a political question, while four disagreed.<sup>67</sup> Justice Rehnquist argued that because the presidential conduct at issue touched foreign relations, the case was nonjusticiable. The implication of this view, which derives from *Curtiss-Wright*, is that the President himself has the authority to determine the scope of his foreign relations powers—and that the judiciary should not interfere with that ability. Whenever the President exercises his foreign relations powers, it is unnecessary for courts to determine whether the *particular* presidential act in question is legitimate as a matter of constitutional or statutory law. This is a paradigmatic example of the categorical approach to the political question doctrine.

Justice Brennan, by contrast, argued in *Goldwater* that although the case demanded interstitial rather than textual analysis, engaging in such analysis “demand[ed] no special competence or information beyond the reach of the Judiciary.”<sup>68</sup> Brennan distinguished between two questions: 1) whether the activity in question is “constitutionally committed” to a particular branch, and 2) whether the government actor exercised appropriate foreign policy judgment. He argued that the former question is the one at issue in *Goldwater*: specifically, whether the power to terminate treaties is constitutionally committed to the President. This kind of question, Brennan argued, is justiciable as a matter of constitutional law.<sup>69</sup> The latter—whether the President made the correct choice in terminating the treaty—is beyond the competence of the judiciary to assess. It is this latter kind of question that should be dismissed on political question grounds. Brennan’s approach more closely follows *Baker*: careful consideration of the specific act in question, and a determination of whether the judiciary is equipped to answer it. The ideological split in *Goldwater* be-

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67. Those four further disagreed as to whether the case was moot (Powell), deserving of further argument on justiciability and the merits (Blackmun and White), or resolvable on the merits (Brennan). *Goldwater*, 444 U.S. at 997.

68. *Id.* at 1000 (Brennan, J., dissenting).

69. *Id.* at 1007 (Brennan, J., dissenting); see also Lawrence R. Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KANSAS L. REV. 449, 480 (1968) (distinguishing the question of which branch bears the responsibility for making a political decision from the question of whether a political branch decision itself was correct).

tween Rehnquist and Brennan reveals that while some judges followed the *Baker* approach, others continued to look at foreign relations cases categorically.

Next, I turn to how the political question doctrine has been applied in ATCA cases. Unsurprisingly, courts have struggled with the question of justiciability, alternating between categorical abstentions because the case touches foreign affairs, and a more discriminating inquiry into the question posed and the types of skills necessary to resolve it. ATCA was rarely invoked by foreign plaintiffs against foreign defendants until 1980, when the Second Circuit decided *Filartiga v. Peña-Irala*.<sup>70</sup> In that case, brought by a Paraguayan family against a Paraguayan police officer for the torture and death of their son, the Second Circuit held that ATCA incorporated the “law of nations” in its current rather than its historical form, and that a government’s torture of its own citizens violated international law.<sup>71</sup> Shortly thereafter, an increasing number of plaintiffs sought to use ATCA to enforce human rights.

*Tel-Oren v. Libyan Arab Republic*<sup>72</sup> was the first major post-*Filartiga* case to raise the political question doctrine. Survivors and relatives of those murdered in an armed attack on a civilian bus in Israel sued the Libyan Arab Republic, the Palestine Liberation Organization (P.L.O.), and several governmental organizations for compensatory and punitive damages under ATCA. While the D.C. Circuit affirmed the District Court’s dismissal, each of the three judges relied on different grounds for dismissal. Judge Robb, in particular, argued that the case raised a nonjusticiable political question. He reasoned that federal courts were not equipped 1) to ascertain whether, as is required under ATCA, the terrorist acts at issue are violations of the law of nations under customary international law and 2) to determine whether the defendants are responsible for the terrorist incident.<sup>73</sup> To engage in such an inquiry, Robb argued, would take the court “towards a consideration of terrorism’s place in the international order” and could “result in un-

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70. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)

71. See Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 6-7 (2002).

72. 726 F.2d 774 (D.C. Cir. 1984).

73. *Id.* at 823 (Robb, J., concurring).

intended disclosures imperiling sensitive diplomacy.”<sup>74</sup> Adjudicating the case would require the court to go further towards recognizing the P.L.O. as an official organization than the political branches had previously.<sup>75</sup> Finally, Robb suggested that the judiciary was rarely competent to decide foreign affairs cases, and that the case at bar did not fit into a narrow category of cases that were justiciable.<sup>76</sup>

Is *Tel-Oren* an example of a categorical abstention on political question grounds or a particularized finding that the judiciary was not competent to evaluate the issues under consideration? There are elements of both approaches in the decision. Robb did argue that the judiciary is not equipped to answer the question of whether terrorist conduct is a violation of international law—an assertion that, while debatable,<sup>77</sup> is grounded in a competence-based assessment. However, Robb also asserts that “the conduct of foreign affairs has never been accepted as a general area of judicial competence”<sup>78</sup> without considering whether the specific subject at issue—private tort claims for terrorist activities—is resolvable in a judicial forum. Under this formulation, the specific activity, terrorism, was lumped under the general heading of foreign conduct and treated as inherently nonjusticiable on this ground. A presumption against finding foreign conduct cases justiciable persists in Robb’s opinion, despite *Baker’s* requirement that courts examine the specific conduct at issue and make an independent finding as to justiciability.

More recently, the District Court of New Jersey cited the political question doctrine in dismissing several class-action suits filed by Holocaust survivors against German manufacturers seeking compensation for forced labor during World War II.<sup>79</sup> In *Burger-Fischer*, the plaintiffs alleged that from 1933 to

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74. *Id.*

75. *Id.* at 824.

76. *Id.* at 825.

77. I dispute the argument that the judiciary is incapable of ascertaining violations of customary international law in Part III, *infra*.

78. *Tel-Oren*, 726 F.2d at 825.

79. See *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J.); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 488 (D.N.J. 1999); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370 (D.N.J. 2001). For a more in-depth treatment and criticism of this set of cases, see Nancy S. Williams, *Political Question or Judicial Query: An Examination of the Modern Doc-*

1945 Degussa AG, a major German corporation, actively cooperated with the Nazis by knowingly processing gold from the teeth, jewelry, and coins of Holocaust victims, and utilizing slave labor in its manufacturing and mining facilities.<sup>80</sup> The second of these allegations—the slave labor claim—implicated the political question doctrine. The court, while acknowledging that slave labor violates customary international law,<sup>81</sup> drew a distinction between claims arising from war hostilities, such as these, and other claims that have been held enforceable against private parties.<sup>82</sup> Unlike the latter cases, compensation claims arising from war hostilities, the court argued, belong exclusively to the state of which the claimant is a citizen. Under international law, the claims are extinguished by peace settlements or reparations treaties between the warring countries.<sup>83</sup> Since several post-World War II treaties subsumed the plaintiffs' claims, the court held that it could not adjudicate the plaintiffs' claims for monies beyond what had been provided in the agreements because such a decision would be, in effect, an improper "refashioning" of those agreements and an evaluation of their adequacy.<sup>84</sup> Therefore, the claims were dismissed on political question grounds. This is a strange result from the perspective of judicial competency because courts are uniquely equipped to interpret both self-executing treaties and the implementing legislation for non-self-executing treaties. The scope of a federal court's jurisdiction legitimately includes the review of reparations treaties, undertaken to assess whether the parties have met their terms. Further, while claiming to apply the *Baker* criteria on an individual basis, the *Burger-Fischer* court used language treating foreign affairs cases as a unit for political question purposes, asserting that "issues dealing with the foreign affairs of this country are distinguishable for the purpose of applying the political question doctrine

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*trine and Its Inapplicability to Human Rights Mass Tort Litigation*, 28 PEPP. L. REV. 849 (2000-2001).

80. *Burger-Fischer and Nazi Era Cases*, though not brought under ATCA, are treated alongside *Iwanowa* in this section because of their factual similarities to that case.

81. *Burger-Fischer*, 65 F. Supp. 2d at 272-73.

82. *Id.* (citing *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)).

83. *Burger-Fischer*, 65 F. Supp. 2d at 274.

84. *Id.* at 282.

from those primarily concerning [the] internal operations” of the country.<sup>85</sup>

In the second of the slave labor cases, *Iwanowa*, a Holocaust survivor sued Ford Werke, the German manufacturer of motor vehicles, and its American parent company, Ford Motor, for employing forced labor during World War II. As in *Burger-Fischer*, the court held that the forced claims were for “reparations” and, therefore, nonjusticiable under the political question doctrine because “responsibility for resolving forced labor claims arising out of a war is constitutionally committed to the political branches of government.”<sup>86</sup> While the court treated reparations claims as categorically out of the purview of courts, the court also undertook an analysis of judicial competency to decide the case, finding several obstacles to adjudication, including the time lag between the alleged violation and the claim, and the indefiniteness of the tortfeasors.<sup>87</sup> The *Baker* criteria have proved to be of mixed impact, sometimes enabling an evaluation of competency, but other courts have continued to consider foreign relations cases or specific types of them, such as reparations cases, to be categorically unreviewable.

In *Nazi Era Cases*, the plaintiff, a Holocaust survivor, brought forced labor claims against German corporation Philipp Holzmann AG and its American subsidiaries. The plaintiff alleged that Holzmann forcibly employed him in the construction of an underground airplane hangar and factory complex during World War II. As in *Burger-Fischer*, the court classified the plaintiff’s forced labor claims as “fundamentally interrelated with the Nazi war effort” and therefore “managed at a governmental level” rather than as an individual claim.<sup>88</sup> However, unlike in *Burger-Fischer* and *Iwanowa*, the agreement at issue in the case was not a post-World War II reparations treaty, but rather an agreement created in 1998 under German law with the input of the United States establishing a German foundation entitled “Remembrance, Responsibility, and the Future.”<sup>89</sup> The Foundation was formed largely in response

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85. *Id.* at 283 (quoting *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972)).

86. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999).

87. *Id.* at 489.

88. *In re Nazi Era Cases*, 129 F. Supp. 2d at 375-76.

89. *Id.* at 372.

to criticisms following *Burger-Fischer* and *Iwanowa* that the post-World War II treaties did not *expressly* provide for the claims of slave laborers.<sup>90</sup> The Foundation administers payments to forced labor victims of the Holocaust, but on the condition that all pending litigation in the United States against German corporations be dismissed. While the court acknowledged that the Foundation was merely a “claims mechanism” lacking “direct preclusive effect on plaintiff’s claims,”<sup>91</sup> it regarded the agreement creating the Foundation as evidencing a “long-standing foreign policy commitment to resolving claims arising out of World War II and the Holocaust at a governmental level.”<sup>92</sup> As a result, the plaintiff’s claim in *Nazi Era Cases* was held nonjusticiable under the fourth and sixth *Baker* criteria. Allowing the case to proceed, the court held, would show a lack of respect towards the executive branch, and would potentially embarrass the country since two branches of government would be taking contrary policy positions.

Despite the outcomes in the Holocaust cases, a number of other foreign relations cases, both under ATCA and otherwise, have survived application of the *Baker* criteria and been held justiciable. In *Klinghoffer v. S.N.C.*,<sup>93</sup> tort claims brought against the P.L.O. for the seizure of an Italian passenger liner and killing of an American Jewish passenger, Leon Klinghoffer, were held justiciable. The court reasoned that even though the facts of the case arose in a politically charged context, that did not change the fact that, at base, the suit was an ordinary claim of breach of care whose resolution was constitutionally committed to the judiciary.<sup>94</sup> While the *Klinghoffer* court found the case justiciable under all six of the *Baker* criteria, it placed particular emphasis on the first one—the textually demonstrable constitutional commitment of the issue to the judiciary—which is consistent with a competence-oriented understanding of the doctrine.

Similarly, in *Linder v. Portocarrero*,<sup>95</sup> a tort claim brought by the surviving relatives of an American citizen against the Nica-

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90. *Id.* at 377.

91. *Id.* at 381.

92. *Id.* at 382.

93. *Klinghoffer v. S.N.C.*, 937 F.2d 44 (2d Cir. 1991).

94. *Id.* at 49.

95. *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992).

raguan anti-government forces who killed him was held justiciable because the claim did not challenge the legitimacy of U.S. foreign policy towards the contras, nor did it require the court to give an assessment of the Nicaraguan civil war.<sup>96</sup> On the contrary, the Court of Appeals found the claim to be “narrowly focused on the lawfulness of the defendants’ conduct in a single incident.”<sup>97</sup> Such language suggests that the *Linder* court focused on the particular question at issue and was not overcome by the fact that the subject matter of the claim touched foreign relations. As *Baker* asserted, the doctrine “is one of ‘political questions,’ not one of ‘political cases.’”<sup>98</sup>

Finally, two ATCA cases from the mid-1990s were also held justiciable on competence grounds. In *Kadic v. Karadzic*,<sup>99</sup> victims from Bosnia-Herzegovina brought claims for genocide, torture, wrongful death, and a number of other injuries against the president of a self-proclaimed Bosnian-Serb republic. The court asserted that it did not “embrace the rather categorical views as to the inappropriateness of judicial action urged by Judges Robb and Bork” in *Tel-Oren* and preferred “to weigh carefully the relevant considerations on a case-by-case basis.”<sup>100</sup> The case was justiciable, the court held, because *Filartiga* established that universally recognizable norms of international law—such as prohibitions on torture and genocide—provided judicially discoverable and manageable standards, thereby satisfying the second *Baker* criteria.<sup>101</sup> The court also sought to minimize the relevance of the last three *Baker* criteria, arguing that they are only relevant where 1) a previous policy decision has been articulated, and 2) a contradiction with that policy would seriously impact political branch interests.<sup>102</sup> This argument distinguishes between the first three, competence-oriented *Baker* criteria, and the more “politicized” last three criteria, which will be discussed further in Part III. Finally, in *Abebe-Jira v. Negewo*,<sup>103</sup> the Eleventh Circuit held that a claim by Ethiopian prisoners against officials of

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96. *Id.* at 337.

97. *Id.*

98. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

99. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

100. *Id.* at 249.

101. *Id.*

102. *Id.*

103. *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996).

the former Ethiopian government under ATCA for torture in violation of international law was justiciable, citing *Linder* and *Baker* as precedent.

### III. A REFINED APPROACH TO THE POLITICAL QUESTION DOCTRINE BASED ON JUDICIAL COMPETENCY

As the above discussion makes clear, application of the political question doctrine post-*Baker* has been inconsistent. In some cases, courts have produced careful analyses of judicial competency. In others, courts have dismissed foreign relations cases categorically. The *Baker* criteria, as currently applied, do not provide an analytic framework through which courts can determine which cases are appropriate for adjudication.<sup>104</sup> Further, as discussed in Part I, as the notion of foreign conduct evolves, the *Baker* test may become even more overinclusive. If courts apply the doctrine categorically, it will be harder to pick out the cases raising valid separation of powers concerns. There is a good chance that courts will eliminate cases that the judiciary is equipped to handle.

How, then, can the political question doctrine be reformulated to better enable courts to dismiss cases whose adjudication would threaten the authority of the executive branch while hearing cases that would not? In other words, how can courts reset the balance between adjudication and dismissal? This Note recommends that federal courts, when ascertaining whether a case raises political questions worthy of dismissal, should make its decision purely upon an assessment of whether the judiciary is competent to handle such a question.<sup>105</sup> This approach would make it easier for courts to apply

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104. See Goldsmith, *supra* note 13, at 1413.

105. There is a long history of scholarship devoted to analyzing judicial competence and its boundaries. Some scholars have worried that excessive reliance on the judicial resolution of individual claims, fueled by the explosion of litigation in federal courts over the past few decades, is countermajoritarian. Others minimize these concerns, arguing that courts are adaptive at responding to increasingly complex social problems, and indeed, that it is appropriate for them to adjudicate such matters regardless of the fact that judges are not elected by the body politic. For a range of perspectives, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Ralph Cavanaugh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371 (1980); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV.

the doctrine, protect the separation of powers, and enable each branch of government to do what it is suited for. A competence-based approach to the doctrine will also help the judiciary deal appropriately with globalization's blurring of domestic and foreign relations into one boundary-shifting category.

Specifically, the *Baker* six-factor test should be revised to eliminate its last three criteria. The first three criteria—determining 1) whether a particular issue is committed to another branch; 2) whether there are existing standards to resolve it; and 3) whether a policy decision necessarily must precede judicial resolution of the issue—are all tasks for which the judiciary is well-equipped. These three factors require courts to engage in legal interpretation, or to make a finding of fact as to whether there are standards or whether a policy decision is required. These processes require an examination of legal texts, whether it be the Constitution, past precedent, or the case at bar. The judiciary, among the three branches, is uniquely equipped to interpret the Constitution and statutory law, consider fact patterns and apply existing precedent to them, and—of particular importance to foreign relations and ATCA in particular—ascertain the existence and violation of customary international law norms.<sup>106</sup> For these reasons, if a court finds any of these three factors present in a case, the political question doctrine should apply and the case should be dismissed.

However, the last three criteria, by contrast, demand quite different skills—the ability to foresee some lack of respect, potential embarrassment for the political branches, or some “need” for adherence to a prior policy decision. For example, how can the judiciary predict whether, by hearing a case, it will be showing the executive some lack of respect? The answer to

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353 (1979). The focus on judicial competency in this Note is motivated by a concern not that too much adjudication creates a countermajoritarian difficulty, but rather, that a different kind of difficulty arises when the judiciary hears the wrong *types* of cases. In the foreign relations arena, courts often dismiss cases that do not actually raise separation of powers concerns. In such instances, the judiciary is taking an unnecessary back seat to the executive, allowing it to act without restraint in cases not warranting it. This is not the countermajoritarian difficulty, but rather, a problem of executive overreaching and excessive judicial deference.

106. This last point is admittedly controversial; I consider it more thoroughly *infra* at 347-50.

that question depends largely upon the individuals who make up the executive branch, the President who is holding office, and other political considerations. Likewise, the judiciary lacks the ability to determine whether there is “an unusual need for unquestioning adherence to a political decision” because judges are not party to such decisions and the circumstances under which they are made. Finally, courts are ill-placed to assess the odds of embarrassment, should multiple branches speak on the same question. These three criteria, unlike the first, require considerations not of language and text, but of behavior. The judiciary is neither accustomed to nor well equipped for undertaking such assessments.<sup>107</sup> These are not interpretive or fact-finding matters, but rather require a level of political instinct and savvy typically demonstrated by the executive and legislative branches.<sup>108</sup> On a functional level, they are not within the judiciary’s skill-set. Courts cannot make policy decisions themselves, nor can they judge the correctness of a past policy decision. They are also not in a position to make guesses about the possible foreign relations consequences of adjudicating a particular case. They can only go as far as establishing that a policy decision must be made

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107. See Brian C. Free, *Awaiting Doe v. ExxonMobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation*, 12 PAC. RIM. L. & POL’Y J. 467, 495 (2003) (arguing that the last three Baker criteria are “prudential” factors that provide less defensive bases for dismissal). For the origin of this term, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (arguing that there are two variants of the political question doctrine, dismissal on constitutional grounds, and dismissal on “prudential” grounds). While I agree with Free that the second three criteria are less defensible, I have classified them not as “prudential,” but rather, as factors which are divorced from considerations of competence and are thereby not appropriate bases on which to determine justiciability.

108. Goldsmith has characterized Baker as creating a “foreign relations effects test” which, rather than helpfully constraining courts to an evaluation of their own competency, actually made the judiciary’s task more difficult by requiring them to identify and accommodate U.S. foreign relations interests—something at which the judiciary is incompetent. Goldsmith, *supra* note 13, at 1396. I would add that one comes to that conclusion by looking at the Baker criteria as a whole, failing to distinguish between the first three and second three. The two sets of criteria are notably different, demanding different capacities of the judiciary; perhaps what Goldsmith ought to argue is that after Baker, the second three criteria eclipsed the first three, thereby resulting in the judiciary’s making adjudication decisions according to assessments that they are not equipped to make.

prior to judicial resolution of the case; they cannot make it themselves. Nor, on a normative level, should courts be asked to make these kinds of determinations. For these reasons, the last three *Baker* criteria should be eliminated.

While courts may pass judgment on the activities of other nations in the process of adjudicating foreign relations cases under the proposed revisions to *Baker*, these judgments should not be a consideration for abstention at the outset, because the judiciary is not equipped to determine the potential consequences of adjudication. This is a political consideration that the courts are not well-equipped to make. Requiring courts to make an assessment of possible foreign relations consequences prior to abstention is not only impractical; it would harm separation of powers principles by requiring courts to do that which the political branches are better suited.

Regardless of the foreign relations consequences that might result, there are three categories of cases in particular that the judiciary is competent to handle and that should not be dismissed under the new *Baker* test: 1) cases dealing with the interpretation of treaties and executive agreements; 2) cases requiring interpretation of domestic statutes; and 3) cases requiring courts to ascertain whether there has been a violation of customary international law.<sup>109</sup>

Cases raising questions of treaty applicability and interpretation should be found justiciable under a revised version of *Baker* with perhaps only a few exceptions. For example, David Bederman argues that the following questions, mere matters of statutory interpretation, will be readily resolvable by the courts: 1) whether a Senate reservation changed the domestic legal effect of a treaty obligation; 2) whether a treaty is self-executing<sup>110</sup> or, if not, whether it has been subsequently implemented by domestic legislation; and 3) whether a treaty

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109. However, as I will discuss *infra*, under the most recent decision in *Alvarez-Machain*, courts will be precluded from hearing many claims stemming from violations of international law on subject-matter jurisdiction grounds. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004).

110. Some scholars have argued that the interpretation of self-executing treaties is the province of the executive branch. See, e.g., John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1309 (2002). However, others maintain that these approaches “do not adequately account for the judiciary’s nondelegable constitutional role.” Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA.

provision has been superseded by a domestic statute.<sup>111</sup> To answer any of these questions, the court must simply interpret the text of any reservation and the text of the treaty, or search through statutory law. By contrast, cases in which the judiciary might be required to ascertain whether a treaty is terminated or suspended due to a breach by a treaty partner should be nonjusticiable. Such cases would require a court to pass judgment on that treaty partner's behavior. This task is better suited to the political branches.<sup>112</sup> The question of whether a treaty has been made part of the "law of the land" in the United States merely requires examining statutory law. By contrast, the question of whether a foreign state has behaved in a manner making the treaty null and void requires the court to consider the political behavior of a sovereign state. When using the new test, courts should be able to identify the difference between these two, recognizing that the former is justiciable while the latter is not.

Similarly, courts should have no problem adjudicating cases involving the interpretation of domestic statutes. Even where such statutes indirectly touch foreign relations the task of statutory interpretation is well within a court's competence. The Supreme Court did precisely this in *Japan Whaling Association v. American Cetacean Society*,<sup>113</sup> when it held that the question at issue—whether the Secretary of Commerce, under the Pelly Amendment,<sup>114</sup> was required to certify Japan as a country conducting fishing in a way that diminished the effectiveness of international fishing programs—was justiciable. The Court reasoned that "interpreting congressional legislation is a recurring and accepted task for the federal courts" and that the question presented "a purely legal question of statutory interpretation."<sup>115</sup> The case did not require the Court to pass judgment on Japan's actions in defying international fishing programs, but merely to evaluate whether the statute required certification of such an action. Importantly, the Court noted that it would be unreasonable to expect the judiciary to shirk its

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J. INT'L L. 431, 478 (2004). It is the latter understanding that supports a competence-based approach to the political question doctrine.

111. Bederman, *supra* note 43, at 1460-61.

112. *Id.* at 1461.

113. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

114. 22 U.S.C. § 1978 (2000).

115. *Japan Whaling Ass'n*, 478 U.S. at 230.

responsibilities under the Constitution “merely because [the] decision may have significant political overtones.”<sup>116</sup> Although some cases raising statutory interpretation questions have been held nonjusticiable under the political question doctrine,<sup>117</sup> they have resulted from, as discussed in Part II, a line of political question jurisprudence marked by inconsistency and murkiness. If the doctrine is to uphold separation of powers principles, it must be grounded in competence-based inquiries that the judiciary is capable of undertaking.

Finally, federal courts are competent to ascertain and enforce norms of customary international law, particularly where their breach would be a violation of the “law of nations” under *Alvarez-Machain*. In *Alvarez-Machain*, the Supreme Court held that federal courts are limited to recognizing only those claims based upon 1) violations of norms that were recognized at the time of ATCA’s passage, or 2) norms of comparable specificity that are “accepted by the civilized world.”<sup>118</sup> However, the Court gave little guidance as to how courts should determine whether a norm meets this standard beyond deciding that the norm at issue in the case—arbitrary arrest—did not.<sup>119</sup>

At this stage, it remains unclear what types of violations will be held actionable under ATCA. Nevertheless, once a claim overcomes the barrier of actionability, it should be considered justiciable. The notion that federal courts can incorporate principles of customary international law into domestic decisionmaking—even in the limited manner allowed by *Alvarez-Machain*—has always been a controversial one, as evidenced by the dispute between the majority and Justice Scalia’s concurrence in that case.<sup>120</sup> One of the most common arguments against the recognition of international law norms under any circumstances is that courts are not equipped to ascertain whether a particular human rights violation—forced labor, for example—is a violation of customary international law.<sup>121</sup>

116. *Id.*

117. *See, e.g.*, *U.S. v. Martinez*, 904 F.2d 601 (11th Cir. 1990); *Smith v. Reagan*, 844 F.2d 195 (4th Cir. 1988); *Dickson v. Ford*, 521 F.2d 234, 235 (5th Cir. 1975). *See generally* BRADLEY & GOLDSMITH, *supra* note 42, at 60.

118. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004).

119. *Id.* at 738.

120. *See id.* at 731.

121. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823 (D.C. Cir. 1984) (Robb, J., concurring); *Al Odah v. United States.*, 321 F.3d 1134, 1148

Similarly, opponents claim that absent domestic legislation, judicial incorporation of customary international norms violates separation of powers principles.<sup>122</sup> It is equally arguable, however, that courts can and have incorporated customary international norms into domestic law. There is no constitutional prohibition to the contrary. Incorporating customary international law would not, therefore, violate separation of powers.<sup>123</sup> In addition, some scholars have argued, though not without opposition, that customary international law has been a part of federal common law since the nation's founding.<sup>124</sup> The Supreme Court confirmed this view in *Alvarez-Machain*.<sup>125</sup>

Under the proposed reformulation of the *Baker* test, the fact that ATCA claims are based upon international law would be insufficient to justify dismissal on political question grounds.<sup>126</sup> Further, courts are familiar with the type of inquiry demanded by the court in *Alvarez-Machain*: whether there is a consensus in the international community that the right claimed by the plaintiff is protected, and whether, among nations, there is a widely shared understanding of the scope of the right.<sup>127</sup> K. Lee Boyd has described several reasons why the judiciary is an appropriate branch to identify, apply, and interpret international law norms. First, it is traditionally the protector of individual rights under domestic law. Second, it can evaluate both objective and subjective evidence of the existence of norms. Finally, it can assign remedies where the political branches are unable to do so.<sup>128</sup> In fact, judicial

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(D.C. Cir. 2003) (Randolph, J., concurring); Brief for the United States as Respondent Supporting Petitioner, *supra* note 5, at 39.

122. K. Lee Boyd, *Are Human Rights Political Questions?*, 53 *RUTGERS L. REV.* 277, 304 (2001).

123. *Id.*, at 307.

124. See, e.g., Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 *HARV. L. REV.* 1824, 1825 (1998). But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *HARV. L. REV.* 815 (1997).

125. *Alvarez-Machain*, 542 U.S. at 724.

126. Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 *DEPAUL L. REV.* 433, 464 (2002) (discussing *Baker v. Carr*, 369 U.S. 186 (1962)).

127. *Id.* at 466 (discussing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)).

128. Boyd, *supra* note 122, at 286-87.

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competence to ascertain norms of customary international law dates back as far as 1900 to the Supreme Court’s decision in *The Paquete Habana*:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination . . . where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . for trustworthy evidence of what the law really is.<sup>129</sup>

Since that time, courts have identified international law norms and applied them in ATCA cases such as *Filartiga* and *Kadic*. Although post-*Alvarez-Machain*, the claims made by plaintiffs in those cases would perhaps not have been found actionable, the process of identifying norms remains the same. That is, while the actionable norms may be fewer after *Alvarez-Machain*—they include “violation of safe conducts, infringement of the rights of ambassadors, and piracy” and “norm[s] of international character accepted by the civilized world and defined with a specificity comparable to . . . the 18th-century paradigms”—courts are still equipped to ascertain them.<sup>130</sup>

On a more general level, it is the constitutionally mandated task of the judiciary—and no other branch—to resolve complaints of unlawful harms by individuals against the perpetrators of such injuries.<sup>131</sup> Courts are assigned this role because they are uniquely competent at doing it. History supports the notion that courts can respond to violations of international law committed against individual plaintiffs without doing damage to foreign policymaking.<sup>132</sup> The conduct of foreign policy should not preclude such claims. This explains why international human rights litigation is not, as a rule, barred by the political question doctrine. Further, if one conceives of the political question doctrine as a mechanism for

129. *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(2) (1987) and comments.

130. *Alvarez-Machain*, 542 U.S. at 724-25.

131. Stephens, *supra* note 126, at 465 (citing *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996)).

132. See generally Stephens, *supra* note 126, at 448.

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the judiciary to assess its own competence—rather than to foresee potential interference or embarrassment problems for the political branches—it becomes easier to accept arguments for the justiciability of ATCA claims, presuming the federal courts already have subject-matter jurisdiction over those claims under the *Alvarez-Machain* standard. If the judiciary is competent to hear such cases, then separation-of-powers is furthered rather than hampered.

#### IV. CONCLUSION: THE URGENCY OF A COMPETENCE-BASED APPROACH

This Note has argued that the history of the political question doctrine, when considered alongside significant changes to international relations and the conduct of foreign policy, justifies a competence-based approach to judicial abstention. Since its inception, the doctrine has been applied inconsistently. Judges, unable to establish with certainty the foreign relations consequences of adjudicating a particular case, have often resorted to abstention wherever foreign conduct was at issue. Many courts have erred on the side of abstention even where the case presented routine matters of statutory or constitutional interpretation—or, in the case of ATCA, where the case required ascertaining norms of customary international law. As globalization enlarges the category of foreign conduct, more and more cases—even those not raising an issue of possible infringement upon the authority of the executive branch—face inappropriate dismissal under the doctrine. As a result, the separation of powers principles underlying both the political question doctrine and the Constitution are weaker, not stronger.

The real concern of the doctrine ought to be excessive deference to the executive branch—not overzealous judicial foreign policymaking. Yet despite this, the Administration maintains that the greater danger is allowing the courts to hear too many foreign relations cases. This ignores the fact that separation-of-powers principles cut both ways: they do not only constrain the judiciary, but they also limit executive branch conduct, even in the foreign policy arena. To make one side of the argument while disregarding the other is unfaithful to the very notion of separation of powers.

By refining the method by which courts determine which foreign relations cases are justiciable and which are not, the friction between the executive branch and the judiciary will be reduced. The doctrine can, as pro-ATCA briefs have argued, be effective in mitigating separation of powers problems if it is legitimately applied to situations in which the judiciary is incapable of resolving the issues raised. It can, if properly applied, ensure that there is no such thing as a “specter” of judicial foreign policymaking. But if the doctrine is applied too broadly, it raises more separation of powers concerns than it eliminates.

If changes are not made to the *Baker* criteria—that is, if the doctrine is not understood as a matter of assessing judicial competence—many justiciable cases are likely to be thrown out.

A competence-based revision to *Baker* is all the more important since the Supreme Court’s June 2004 decision in *Alvarez-Machain*. While the decision undoubtedly narrowed the types of violations over which federal courts will have jurisdiction, political question arguments of the kind that the Administration raised will continue to persist. The Court implied as much, noting that “the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”<sup>133</sup> In fact, there seems to be an overemphasis on justiciability in dicta, given that the Court’s primary holding was on the actionability of ATCA claims. The Court seems to be urging future defendants not to forget to make use of political question doctrine, even as it arms them with arguments for why most ATCA claims will not survive the “comparable specificity” standard. In fact, defendants in a post-*Alvarez-Machain* case, *Doe v. Unocal Corp.*, did precisely that, arguing in a supplemental brief prior to settlement of the suit that adjudication of the case would “adversely affect foreign policy” because “these lawsuits challenge the ‘constructive engagement’ strategy embodied in the Burma Sanctions Act . . . and promote ‘diplomatic friction’ by allowing foreign citizens to use the U.S. judicial system as an avenue to indirectly chal-

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133. *Alvarez-Machain*, 542 U.S. at 727.

lenge the acts of their own government.”<sup>134</sup> A revision to the political question doctrine is therefore all the more urgent lest federal courts, following the dicta of *Alvarez-Machain*, dismiss cases that they are well-equipped and competent to adjudicate.

Cases presenting justiciability issues will also be brought under common law tort principles, or under statutory provisions other than ATCA. In the coming years, the judiciary will continue to confront questions about the proper bounds of its own decisionmaking power—and, accordingly, that of the executive branch. Where courts are competent to resolve the legal claims of wronged individuals, furthering human rights on a case-by-case basis should not take a back seat to foreign policymaking by the executive branch.

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134. Supplemental Reply Brief of Defendants-Appellees at 10, *Doe v. Unocal Corp.*, Nos. 00-56603, 00-56628 (filed Sept. 22, 2004). In this case, local villagers from a particular region of Myanmar brought forced labor, torture, and rape claims against Unocal Corporation and one of its wholly owned subsidiaries, alleging that Unocal was liable under ATCA by virtue of its awareness of forced labor, murder, rape, and torture acts committed by the Myanmar military in connection with Unocal's natural gas pipeline project. *Doe v. Unocal Corp.*, 963 F. Supp. 880, 885 (C.D. Cal. 1997). A Ninth Circuit panel reversed summary judgment on the forced labor, murder, and rape claims, but the Circuit decided to rehear the case en banc pending the Supreme Court result in *Alvarez-Machain*. *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003). Following that result, the Bush Administration filed a brief seeking dismissal of the case. Center for Constitutional Rights, Docket: *Doe v. Unocal*, at [http://www.ccr-ny.org/v2/legal/corporate\\_accountability/corporateArticle.asp?ObjID=LRRSFKnmmm&Content=45](http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=LRRSFKnmmm&Content=45) (last visited Jan. 29, 2006). In September, Unocal's motion to dismiss was denied. *Id.* In December 2004, the parties agreed to a settlement, with Unocal agreeing in principle to compensate plaintiffs and provide funds for the development of programs to improve the living conditions, health care, education, and human rights of those living in the pipeline region. *Id.*